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November 8, 2022

VIA EFC

Hon. Pamela K. Chen  
United States District Court  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, NY 11201

Re: SEC v. Xia, et al., No. 21-cv-05350-PKC-RER

Dear Judge Chen:

We write on behalf of Defendants, Richard Xia and Fleet Financial, regarding 33 subpoenas the SEC recently served upon the following 33 non-party witnesses:

5D Architecture & Engineering, PLLC Capalino Cassone Leasing, Inc. D-Best Construction Group, Inc. Flushing Willets Point Corona LDC HR&A Advisors, Inc. Impact Environmental March Imaging Systems, Inc. Mega Engineering and Land Surveying P.C. Muser Rutledge Consulting Engineers Roux Associates, Inc. Severud Associates Consulting Engineers, PC TerraSure Services, LLC. Vidaris, Inc. Xtreme Concrete	ADP Total Source Bushwick Metals LLC D&A Contracting Ettinger Engineering Associates Glickman Engineering Associates PLLC Great City Plumbing Inc. Harman Jablin Architects LLP Major Building Safety Consulting Metal Partners Rebar Metro Wide Format, LLC New York Hoist LLC Rizzo Group Thornton Tomasetti Trackvia Inc. Triboro Plumbing & Heating Corp. TVS Design United Rentals V&P Altitude Corp.
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In response to the first wave of 15 non-party subpoenas sent to us, we wrote to the SEC's counsel on November 3, 2022, to object to the broad discovery on several grounds and to request that the SEC withdraw the subpoenas. A copy of our November 3, 2022, letter to the SEC is

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attached hereto as Exhibit A. The SEC rejected our request and, in fact, doubled down on the discovery, serving a second wave of 18 more non-party subpoenas. A copy of the SEC's November 4, 2022, email is attached hereto as Exhibit B.

These subpoenas followed immediately after the Court granted the parties' joint request to extend the discovery deadline to accommodate *existing* outstanding discovery. At no time did the SEC inform Defendants that it intended to use the extension to commence an onslaught of subpoenas that could not possibly be accommodated before the original discovery cut-off or even within the brief extension granted by the Court.

Contrary to the SEC's argument that Defendants have no standing to challenge the non-party subpoenas, they have a legitimate interest in quashing subpoenas that needlessly prolong discovery or harass witnesses or potential witnesses. *See United States v. Eldridge*, No. 09-CR-329, 2015 U.S. Dist. LEXIS 107304, \*6 (W.D.N.Y. Aug. 14, 2015). More importantly, regardless of Defendants standing to object to the SEC's non-party subpoenas, "the Court has an independent duty to review the propriety of the subpoena[s]." *Id.* at \*7

The 33 non-party subpoenas are improper. As we explained in our November 3, 2022, letter to the SEC, none of the non-parties to whom the subpoenas were directed were involved in preparing or making *any* statements in connection with the sale of any partnership interest at issue in this case. Nearly all of them had no relationship with any party or with either Project until months or years *after* the statements at issue in this case were made. Therefore, the non-party witnesses to whom the subpoenas are directed have no knowledge or any discoverable documents relevant to whether the statements at issue were materially false or misleading when they were made or whether Defendants had the requisite scienter at that time.

The SEC has not shown a genuine need for the non-party depositions. *First*, the SEC claims it needs the depositions to determine what work was done by which vendor. However, the private placement memoranda did not identify which contractors and sub-contractors would be performing any particular work or how much work they each would perform. The depositions cannot yield any evidence relevant to the SEC's claim that statements in the private placement memoranda were materially false or misleading. Moreover, the work was performed months or years *after* all the funds from the EB-5 visa investors were paid in. The investors might have standing to assert a claim that the money they invested was *later* mis-spent, but *the SEC does not* and, in any event, it has not asserted such a claim in the Amended Complaint. For that same reason, the SEC's argument that it seeks to discover how funds were *subsequently* spent after being paid in by the EB-5 visa investors is irrelevant to whether any statements in the various private placement memoranda were materially false or misleading when they were made.

The SEC's attempt to "follow the money" at this advanced stage of the litigation raises serious concerns about its good faith basis for commencing the action and for obtaining the Asset Freezing Order when it did so. The SEC's three-year pre-suit investigation certainly would have encompassed these issues if, as it now says, they are pertinent to any issue raised by the SEC's Amended Complaint. Surely, the SEC believed it knew enough to bring the weight of the federal

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government down upon private citizens when it commenced the action and sought the draconian remedy of a pre-judgment asset freeze. The SEC knows it *must* account for how much of the EB-5 visa investors' funds were appropriately used to develop the two massive projects, including the land acquisition costs as well as the construction costs. *See Liu v. SEC*, 140 S. Ct. 1936 (2020). The SEC should not need to conduct 33 non-party depositions at this late stage of the litigation to do so

Defendants believe the SEC has served these 33 non-party subpoenas to interfere with Defendants' existing business relationships to prevent Defendants from completing either Project. The SEC is abusing the discovery process – to say nothing of the considerable weight of the federal government – to harass the non-party witnesses. Certainly, it is needlessly prolonging the discovery process, and needlessly multiplying Defendants' costs by doing so. The SEC knows that Defendants have little or no ability to pay counsel while the Asset Freezing Order remains in place, particularly because it insists on freezing hundreds of millions of dollars more than the \$229 million cap imposed by the Court in the Asset Freezing Order. The SEC trying to overwhelm Defendants and their counsel and make it impossible for Defendants to defend themselves.

Thank you in advance for Your Honor's kind consideration. We are, as always, available to answer any questions Your Honor may have.

Respectfully yours,

A handwritten signature in blue ink, appearing to read "Mark C. Rifkin", with a stylized flourish at the end.

Mark C. Rifkin

cc: All Counsel (via ECF)